Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1800

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITIONER'S MOTION TO SUPPRESS AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THE SUPERIOR OIL COMPANY
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INTRODUCTORY STATEMENT

COMES NOW, The Superior Oil Company ("Superior"), Petitioner herein, and files herewith its Motion to Suppress and, in the alternative, its Reply to the Brief in Opposition filed in this proceeding by the Federal Energy Regulatory Commission ("Commission"), Respondent herein. In the interest of brevity, Superior adopts by reference its statement of the case contained in its Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit previously filed herein on June 20, 1978.

MOTION TO SUPPRESS

Under Rule 24[1] of the Rules of the Supreme Court, when any agency of the United States is the named re-

[1] Reproduced as Appendix "A" hereto.

spondent in a Petition for Writ of Certiorari filed in this Court, the time period for filing a Brief in Opposition thereto is automatically extended twenty days beyond the usual thirty days provided for filing a Brief in Opposition, and accordingly, the Commission's brief was due on or before August 9, 1978 (see Appendix "A").

By letter of date August 8, 1978, reproduced as Appendix "B" and attached hereto, the Solicitor General on behalf of the Commission as respondent, requested under Rule 34 (5)[2] of the Supreme Court Rules, an extension of time to and including August 30, 1978, within which to file the Commission's response. At that time, Superior had and made no objection to the Solicitor General's request.

By letter of August 9, 1978, reproduced as Appendix "D" and attached hereto, the Honorable Michael Rodak, Jr., Clerk of the Supreme Court, pursuant to the provisions of Rule 34 (5),[2] granted the Solicitor General's request for the extension of time to August 30, 1978, and further advised him that no further extension of time would be granted by the clerk to file the Brief in Opposition. Again, Superior had and made no objection to the granting of the request.

Yet, without any apparent explanation or notice to the Petitioner, the Commission's Brief in Opposition dated simply "September, 1978", was not in fact filed until after the filing deadline of August 30, 1978 had passed. Superior's counsel was first informed by long distance telephone by personnel of the Supreme Court Clerk's office that the actual filing date of the Commission's Brief in Opposition was September 5, 1978. (See also Appendix "E" attached hereto.)

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[2] Reproduced as Appendix "C" hereto.

Inarguably, the rules[3] of the Court must be applied even-handedly to all litigants before it, and when first the rules themselves and then the good offices of the Clerk of the Court are both utilized to extend the filing date a total of forty-one days beyond the thirty-day filing time required of an ordinary respondent (i.e., other than the United States or an agency thereof), then Superior is of the opinion that the Court's rules have been inexplicably ignored and that Superior's rights as a party litigant before the Court would be adversely affected if the rules are not enforced in this instance.

Accordingly, Superior hereby moves that the Commission's Brief in Opposition be suppressed and given no consideration whatever by the Supreme Court in reviewing Superior's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit previously filed in this proceeding.

REPLY TO BRIEF IN OPPOSITION

In the alternative, if Superior's Motion to Suppress is denied, then Superior makes the following reply to the Commission's Brief in Opposition:

ARGUMENT

Both the Commission (Respondent's Brief, page 6) and the Fifth Circuit Court of Appeals (Petitioner's Appendices, A-7 to A-8) are apparently of the impression that the substantial modification in the Commission's replacement contract policy as first enunciated by the Commission in Opinion 770-A issued November 5, 1976, was merely *interpretative* of the Commission's replacement contract policy and was not a *substantive* change. Superior, on the

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[3] U.S. Sup. Ct. Rules, 28 U.S.C.A.

other hand, has consistently contended (Petitioner's Petition, page 27) that until the issuance of Opinion 770-A, each pronouncement of the Commission's replacement contract policy had been consistent (i.e., Opinion Nos. 639, 699-H and 770), for all required that the base contract "expire by its own terms" or "of its own terms", with the emphasis being on the original contractual provisions of the base agreement including the running of a primary term (if stated and identified as such) if, as and when required by such provisions (i.e., where the term provisions of a contract are not modified by the words ". . . *unless terminated as elsewhere herein provided* . . ." as they are in the case at hand). In keeping with this position, Superior has consistently maintained that when Opinion 770-A issued on November 5, 1976 it contained a *substantive* change (i.e., the requirement that the full primary term of the original gas sales contract must run, unaffected by any so-called *"premature termination provisions"*) and therefore the Commission, before legally effecting this substantive change, was required to comply with the Administrative Procedure Act (APA).[4] The Commission has not done so and therefore the Commission orders complained of here are not valid. Prior to Opinion 770-A the Commission's replacement contract policy required only that the original gas sales contract "expire by its own terms" or "of its own terms". The labeling of the new requirements for such policy in Opinion 770-A as merely "interpretative" or "explanatory" does not change the substantive effect the new requirements of the policy have not only on Superior, but on the entire industry as well.

As Judge Theis observed in *Energy Reserves Group* v. *Federal Energy Administration,* 447 F.Supp. 1135 (Janu-

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[4] 5 U.S.C. § 553

ary 26, 1978, U.S. District Court, D. Kansas) with reference to the Federal Energy Administration:

> "Although the FEA has authority to issue guidelines having the force and effect of law, this does not mean every regulation promulgated by the FEA is substantive. 'That agency activity falls within the permissible scope of statutory authority does not alone answer the question of the applicability of Section 4' [of the Administrative Procedure Act]. *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90 (D.D.C.1967). The label attached to a ruling by the enacting agency, the procedures utilized to promulgate it, and the practical effect given such ruling in further agency proceedings relevant thereto, are all factors indicative of whether a rule is interpretative or substantive. If the FEA intends a rule to be substantive, it is required to label it as such and utilize APA notice and comment procedures necessary to render the final guideline legally effective. See 15 U.S.C. § 757(i)(1). A substantive guideline promulgated without resort to such procedures is invalid." (Opinion at 1143.)
>
> "A final important consideration in determining whether a rule is interpretative or substantive in nature is the extent of its impact upon the regulated industry. If a rule or order, no matter how labeled by the agency, has an immediate and significant impact upon a regulated industry or an important class of members of products of that industry prior to a chance for a full hearing upon the merits of the policy espoused in the rule, then notice and an opportunity for comment are required. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, supra; *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972); *Texaco* v. *Federal Power Commission*, 412 F.2d 740 (3rd Cir. 1969); *Pharmaceutical Manufacturers Assoc.* v. *Finch*, 307 F.Supp. 858, 863 (D.Del.1970); *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90 (D.D.C. 1967)." (Opinion at 1146.)

> "Upon the basis of the substantive effect given Ruling 1974-29 in subsequent proceedings before the FEA, and the substantial effect it has upon plaintiffs prior to any chance for presentation of evidence or hearing upon the merits of the ruling, the Court finds Ruling 1974-29 to be a substantive rather than an interpretative order. Because Ruling 1974-29 was promulgated by the FEA without notice or opportunity for comment, it is void and ineffective to affect the rights of plaintiffs herein. See *Morton* v. *Ruiz*, 415 U.S. 199, 39 L.Ed. 2d 270, 94 S.Ct. 1055 (1974)." (Opinion at 1147.)

The Court is respectfully requested to take judicial notice of the fact that regulations are pouring forth from various administrative agencies of the federal government at a heretofore unprecedented rate. If our society, complex and inter-dependent as it has become, is to progress and function under the rule of law, every citizen and every industry must be afforded the protection of the Administrative Procedure Act as Congress most surely must have intended.

The Commission not only has failed to comply with the Administrative Procedure Act in making a substantive change in the replacement contract policy, but has sought to do so retroactively, as Superior's July 17, 1953 contract had already terminated in accordance with its own terms at the time Opinion 770-A issued on November 5, 1976.

Furthermore, Superior does not here dispute the Commission's authority to require the continuation of dedicated service to the interstate market under the Natural Gas Act and consequently the references to (Respondent's Brief, page 9) to *California* v. *Southland Royalty Co.*, No. 76-1114, decided May 31, 1978 and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 are not apposite.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE SUPERIOR OIL COMPANY

W. B. WAGNER, JR.
General Counsel

JAMES M. DUNNAM
Attorney
P. O. Box 1521
Houston, Texas 77001

Attorneys for
The Superior Oil Company

By .....
James M. Dunnam

September 18, 1978

CERTIFICATE OF SERVICE

This Petitioner's Motion to Suppress and Reply to Respondent's Brief in Opposition has been served on counsel of record for the Federal Energy Regulatory Commission in accordance with Rule 33(1) of the Supreme Court Rules on or before the 20th day of September, 1978, and upon the Solicitor General of the United States in accordance with Rule 33(2)(a) of said rules by the undersigned attorney who was duly admitted to practice before the Supreme Court of the United States on June 1, 1976.

.....
James M. Dunnam
Attorney for Petitioner

APPENDIX "A"

UNITED STATES SUPREME COURT RULE NO. 24

Rule 24. Brief in opposition—reply—supplemental briefs

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33. In cases where the United States or any agency, officer or employee thereof is the respondent, the respondent shall have an additional twenty days to file the said opposing brief.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file, or upon the actual filing of such brief in a shorter time, the petition and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling

attention to new cases or legislation or other intervening matter not available at the time of his last filing.

As amended Nov. 22, 1971.

APPENDIX "B"

SEAL

OFFICE OF THE SOLICITOR GENERAL
Washingon, D.C. 20530
August 8, 1978

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Superior Oil Co. v. Federal Energy Regulatory Commission, No. 77-1800

Dear Mr. Rodak:

The petition for a writ of certiorari in the above case was filed on June 20, 1978, and was served on the government the same day. The government's response is therefore due on August 9, 1978. We respectfully request, under Rule 34(5) of the Rules of the Court, an extension of time to and including August 30, 1978, within which to file the government's response.

A draft response has been prepared and the additional time is needed to complete review and editing and printing.

Sincerely,

WADE H. McCREE, JR.,
Solicitor General

cc: W. B. Wagner, Jr., Esquire
P.O. Box 1521
Houston, Texas 77001

RECEIVED
AUG 11 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department

APPENDIX "C"

UNITED STATES SUPREME COURT RULE NO. 34

Rule 34. Computation and enlargement of time

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper must be presented and served upon all other parties as provided in Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. All applications for extensions of time to file briefs, motions, appendices or other papers, to designate parts of records for printing in appendices, or otherwise to comply with time limits provided by these rules, except applications for extensions of time to file petitions for certiorari, to docket appeals, to petition for rehearings or to issue mandates shall in the first instance be acted upon by the clerk, whether addressed to him, to the court or to a justice. Any party aggrieved by the clerk's action on such application may request that it be submitted to a justice or to the court.

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

August 9, 1978

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Re: The Superior Oil Company v. Federal Energy Regulatory Commission, No. 77-1800

Dear Mr. McCree:

Your request of August 8, 1978, for an extension of time within which to file the Government's response to the petition for a writ of certiorari in the above-entitled case is granted, and the time has been extended to and including August 30, 1978.

No further extension of time will be granted by the Clerk to file this brief.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: James M. Dunnam, Esq.
P. O. Box 1521
Houston, Texas 77001

RECEIVED
Aug. 11, 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department

APPENDIX "E"

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1800

The Superior Oil Company,

Petitioner,

v.

Federal Energy Regulatory Commission.

Service of five copies of Brief for the Federal Energy Regulatory Commission in opposition, is acknowledged this 11th day of September, 1978.

s/ JAMES M. DUNNAM
W. B. Wagner, Jr.
James M. Dunnam

Air Mail: Sept 5, 1978

Note: Please date, sign and
return this acknowledgment to:

OFFICE OF THE SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20530

RECEIVED
Sept. 11, 1978
THE SUPERIOR OIL CO.
Houston, Texas
Legal Department